NO. 80-332

FILED
DEC 22 19[illegible]

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES A. RHODES et al.,
PETITIONERS

vs.

KELLY CHAPMAN et al.,
RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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(Continued Inside Front Cover)

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SEPTEMBER 2, 1980
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2

INDEX

Page

Order, United States Court of Appeals
For the Sixth Circuit, filed June 6, 1980..... J.A. 1

Findings of Fact and Conclusions of Law,
United States District Court,
Southern District of Ohio, Western Division,
filed June 29, 1977..... J.A. 1

Memorandum, United States District Court,
Southern District of Ohio, Western Division,
filed March 21, 1978..... J.A. 1

Judgment, United States District Court,
Southern District of Ohio, Western Division,
filed April 7, 1978..... J.A. 1

Memorandum to George Denton from
George Voinovich, Inc. dated May 5, 1976
Reference: Inmate Capacity - Southern
Ohio Correctional Facility..... J.A. 2

Memorandum from George S. Voinovich, Inc.
dated May 5, 1976 Re: "Space Available for
the Housing, Recreation, Education, and
Service of Inmates"..... J.A. 3

Memorandum Opinion, United States
District Court, Southern District of Ohio,
Western Division,
filed December 14, 1976..... J.A. 5

Second Amended Complaint (Class Action),
United States District Court,
Southern District of Ohio, Western Division,
filed December 27, 1976..... J.A. 14

Page

Alternative Plans In Compliance With This Court's Order Of June 29, 1977, United States District Court, Southern District of Ohio, Western Division, filed November 11, 1977 ..... J.A. 26

Order, United States District Court, Southern District of Ohio, Western Division, filed May 8, 1978 ..... J.A. 35

Stipulation and Entry, United States District Court, Southern District of Ohio, Western Division, filed August 25, 1978 ..... J.A. 38

Order Denying Motion For Relief From Judgment And Stay Of Execution, United States District Court, Southern District of Ohio, Western Division, filed August 14, 1979 ..... J.A. 40

Order, United States Court of Appeals For The Sixth Circuit, filed November 8, 1979 ..... J.A. 44

J.A. 1

ORDER

United States Court of Appeals
For The Sixth Circuit
Filed June 6, 1980

(omitted)

Printed at A-2 of
Petition for Writ of Certiorari

FINDINGS OF FACT AND CONCLUSIONS OF LAW

United States District Court
Southern District of Ohio
Western Division
Filed June 29, 1977

(omitted)

Printed at A-4 of
Petition for Writ of Certiorari

MEMORANDUM

United States District Court
Southern District of Ohio
Western Division
Filed March 21, 1978

(omitted)

Printed at A-39 of
Petition for Writ of Certiorari

JUDGMENT

United States District Court
Southern District of Ohio
Western Division
Filed April 7, 1978

(omitted)

Printed at A-42 of
Petition for Writ of Certiorari

J.A. 2

GEORGE S. VOINOVICH, INC.
A FULL SERVICE CORPORATION OF:
URBAN PLANNERS • CONSTRUCTION MANAGERS • DEVELOPERS

May 5, 1976

Commissioner George Denton
Director, Dept. of Rehabilitation and Correction
1050 Freeway Drive North
Columbus, Ohio 43229

Reference: Inmate Capacity - Southern Ohio
Correctional Facility

Dear Commissioner Denton:

Enclosed are the Inmate Population figures that our Correctional Consultant, Robert D. Barnes, A.I.A., was telling you about during our visit to your office last Friday.

We are also enclosing an article from The Wall Street Journal on a new Federal Community Correctional Center. Of particular interest was the reference to the area per inmate, i.e., 200 Sq. Ft.

Hope this data helps you and that additional construction funds for Penal Institutions are soon available.

While two (2) men per cell may be permitted healthwise, it still is custodially undesirable I'm certain.

Very truly yours,

George S. Voinovich, Inc.

/s/ Paul V. Voinovich
Paul V. Voinovich, President

PVV:srb
Encl.

GEORGE S. VOINOVICH, INC.
A FULL SERVICE CORPORATION OF:
URBAN PLANNERS • CONSTRUCTION MANAGERS • DEVELOPERS

May 5, 1976

MEMORANDUM RE: Southern Ohio Correctional Facility

"Space Available for the Housing, Recreation, Education, and Service of Inmates"

Area in Square Feet

B-1, 2	Administration	55,125 Sq. Ft.
C-1, 2	Offices - Treatment and Custody	26,980 Sq. Ft.
C-3	Inmate Services	4,610 Sq. Ft.
D-1, 2	Hospital and Receiving	25,240 Sq. Ft.
E-1, 2, 3	Shop and Laundry	120,000 Sq. Ft.
F	Inmates - Dining Room & Kitchen	39,600 Sq. Ft.
G	Chapel	8,580 Sq. Ft.
H	Library and School	22,448 Sq. Ft.
I	Special Treatment Dining Room	4,580 Sq. Ft.
J-1 thru 4	Special Treatment Cells	63,200 Sq. Ft.
K-1 thru 4	Inside Cell Blocks	63,200 Sq. Ft.
K-5 thru 8	Outside Cell Blocks	63,200 Sq. Ft.
L-1 thru 8	Outside Cell Blocks	126,400 Sq. Ft.
M-1, 2	Gymnasiums	34,720 Sq. Ft.
N and O	Warehouse, Etc.	49,450 Sq. Ft.
P	Boiler House	12,600 Sq. Ft.
	Total	719,933 Sq. Ft.
	Say	720,000 Sq. Ft.

Housing - Capacity

Hospital(2 Dorms@10 ea.)(20 Outside Rooms)	40)	
Receiving (Inside Cells)	80)	120
Death Row (Inside Cells)	20)	
Special Detention (Inside Cells)	240)	260
Inside Cells	320)	
Outside Cells	960)	1,280
		1,660

Memo Re: Southern Ohio Correctional Facility
Cont'd. May 5, 1976

Area in Housing Area

Inside Cells are 6'-0" x 8'-0" x 9'-0" High = 432 Cu. Ft.

Outside Cells are 6'-6" x 12'-6" x 9'-0" High = 731 Cu. Ft.

* * * * * * * * *

Possible Capacity Figures

Outside Cells could be double decked which would still provide 365 cu. ft./inmate in sleeping quarters which is adequate.

This would increase capacity by	960 Inmates
Existing Housing Capacity	1,660 Inmates
New ~~Emergency~~ Housing	2,620 Inmates
or Excluding Hospital & Receiving	120 Inmates
Reasonable Emergency Capacity	2,500 Inmates*

*Area per Inmate - 288 Sq. Ft.

Robert D. Barne, A.I.A.
Correctional Consultant

NO. C-1-75-251

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,
Plaintiffs,

vs.

JAMES RHODES, Governor,

JAMES RHODES, Governor, et al.,
Defendants.

MEMORANDUM OPINION

Filed December 14, 1976

This is a prisoner's civil rights action brought pursuant to 42 U.S.C. § 1983. The action was orginally filed *pro se* by Kelly Chapman and Richard Jaworski, two inmates at the Southern Ohio Correctional Facility in Lucasville, Ohio, and alleged that the double celling of inmates at that institution violates the constitutional rights of all the inmates. Plaintiffs' motion to certify this action as a class action was denied by this Court on the ground that as neither Chapman nor Jaworski were licensed attorneys, the class would not be represented by competent counsel.

Subsequently, several attorneys filed an entry of appearance on behalf of the inmates and renewed the motion to certify the case as a class action. That motion was granted by the Court in a short Order on April 1, 1976. The defendants then moved for summary judgment, which motion was denied by this Court on July 29, 1976. Plaintiffs

moved to file an amended complaint by leave of Court. On July 29, 1976, that motion was granted in part and denied in part. The motion was granted insofar as it involved the original parties defendant in the original complaint and the allegations, causes and prayers pertinent to said original parties. The motion was denied insofar as the plaintiffs sought, by amendment, to add new parties defendant and allegations, causes and prayers against any such new parties. The plaintiffs were given 30 days within which to file an amended complaint consistent with the July 29 Order.

On August 30, 1976, plaintiffs did file their amended complaint. Thereafter, the defendants moved to dismiss the amended complaint on the grounds that the named plaintiffs were no longer representative of the certified class, that the amended complaint did not comply with this Court's July 29 Order, and on the grounds that the amended complaint failed to state a claim upon which relief can be granted. The action is now before this Court on the defendants' motion to dismiss. The defendants' motion to dismiss the entire action is denied. However, for the reasons that are set forth in this opinion, several of the causes of action presented in the amended complaint are dismissed.

CONVERSION OF RULE 12(b) (6) MOTION INTO A SUMMARY JUDGMENT MOTION

The plaintiffs, in their memorandum in opposition to the defendants' motion to dismiss argue that the motion to dismiss should be treated as a Rule 56 motion for summary judgment because several affidavits have been filed as exhibits in this case, both by the defendants and the plaintiffs. Plaintiffs then claim that there are several genuine issues of material fact remaining to be resolved in this action which preclude this Court from granting summary judgment in the defendants' favor.

Rule 12 of the Federal Rules of Civil Procedure provides in part that:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Either party or both may bring this conversion provision into operation by submitting extraneous matters. *See, e.g., Evans v. McDonald Aircraft Corp.*, 395 F. 2d 359 (8th Cir. 1968). However, the Court has complete discretion to determine whether or not to accept any material offered in conjunction with the Rule 12(b) (6) motion, 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: Civil § 1366 at 678 (1969). In this action, as the record indicates, there has been almost no discovery completed. This Court believes that such discovery is necessary before the summary judgment procedure may be utilized effectively, if at all. Therefore, at this stage of the proceedings the affidavits submitted by both parties will be excluded and this Court will not convert the Rule 12(b) (6) motion into a Rule 56 motion.

STANDING

A. Chapman's and Jaworski's Standing to Challenge the Double Celling

The defendants, through their motion to dismiss, allege that neither plaintiff Chapman nor plaintiff Jaworski are presently double celled. While the defendants have submitted an affidavit to that effect, they have also requested this Court only to consider that affidavit as "background

information for the benefit of this Court." (Defendants' reply memorandum, doc. 45). In any event, this Court does not believe that even if Chapman's and Jaworski's claims have been mooted, this case has been removed from the realm of a "case" or "controversy." The Supreme Court has permitted class actions to go forward despite the representatives' technical lack of standing due to mootness where the issue is "capable of repetition, yet evading review." *See Roe v. Wade*, 410 U.S. 113, 125 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Moore v. Ogilvie*, 394 U.S. 312 (1969). Furthermore, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1952). *See also, Davis v. Caldwell*, 53 F.R.D. 373, 376 (N.D. Ga. 1971).

B. Chapman's and Jaworski's Standing to Represent the Inmates on Questions Other Than Double Celling.

The plaintiffs in their amended complaint have raised virtually the entire gamut of potential prisoner's complaints arising from confinement. They seek in this class action to challenge everything from the cleanliness of the trays in the dining room to the adequacy of the medical facilities.

It is axiomatic that if the named plaintiffs lack individual standing they may not bring an action on behalf of anyone; merely claiming to represent an injured class will not satisfy the requirement of individual standing. *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973); *Accord, Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Berger, C.J., concurring).

After individual standing is determined, the parties seeking representative status must show that they are a member of the class sought to be represented, that the representatives' claims are typical of the proposed class, and the class will be fairly and adequately represented. Rule 23(a)

Federal Rules of Civil Procedure. The representatives must meet both the threshold constitutional standing requirements and Federal Rules of Civil Procedure 23(a) (3) and (4) standing requirements in order to insure that the class represented has a personal stake in the outcome of the case and to preserve procedural due process for the absent members of the class.

When this Court certified this action as a class action, it was on the ground that inmates Chapman and Jaworski were presently double celled, and were represented by competent counsel. There has never been any showing or determination by this Court that inmates Chapman and Jaworski were adequate representatives of the inmates of the Southern Ohio Correctional Facility in any regard other than whether double celling is a violation of the United States Constitution. Thus, this Court's certification of this action as a class action was only as to the issue of double celling. When the Court ruled on the plaintiffs' motion to amend their complaint, it specifically limited the plaintiffs to amending the allegations pertinent to the original complaint.

Therefore, insofar as the amended complaint raises new issues and asserts new allegations other than those dealing with the question of the constitutionality of double celling inmates at the Southern Ohio Correctional Facility, it is not in compliance with this Court's grant of leave. Plaintiffs fourth and eighth causes of action fail to comply with this Court's July 29 Order. They, therefore, should be and hereby are stricken.

FAILURE OF OTHER OF PLAINTIFFS' CAUSES OF ACTION TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs' second cause of action is that the absence of personal privacy at the Southern Ohio Correctional Facility violates the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution.

This Court has been unable to find a single decision holding that convicted felons have a constitutional right to private living quarters. As the United States Supreme Court stated in *Alanza v. New York*, 370 U.S. 139, 143 (1962), "a jail shares none of the attributes of the privacy of a home, an office, an automobile or a hotel room."

Plaintiffs' fifth cause of action is that the defendants have failed to provide adequate protection to insure the health and safety and well being of members of the plaintiff class and those members are required to live under fear of constant attack and assault or in self-imposed isolation in violation of the fourteenth amendment. In essence, what plaintiffs are claiming is that they must either seek a transfer to a segregated unit or live in fear of attack from other inmates. Plaintiffs point out that such a transfer of necessity results in their losing certain privileges and advantages. However, since the plaintiffs admit that they have a right to request a transfer and even though such a transfer entails a vast reduction in privileges, their claim does not amount to a constitutional violation. *Breeden v. Jackson*, 457 F. 2d 578 (4th Cir. 1972); *Schyska v. Shifflet*, 364 F. Supp. 116 (N.D. Ill. 1973).

Plaintiffs' sixth cause of action is that the defendants, by selecting a limited number of individual inmates to participate in the work, vocational, educational and other opportunities and programs, have violated the equal protection clause of the fourteenth amendment of the United States Constitution.

The problem, of course, with plaintiffs' contention is that a prisoner has no constitutional right to work or be educated while in prison. *Cradle v. Superintendent*, 370 F. Supp. 79 (W.D. Va. 1974). The plaintiffs' contention, in essence, is that if a state undertakes to provide any rehabilitative services, it must provide such services to all inmates. However, as there are no constitutional duties imposed on any governmental entity to educate or rehabilitate a prisoner, this Court believes that efforts to rehabilitate and

educate are to be commended and that requiring every prisoner to be treated exactly alike might discourage rather than encourage such programs. *McLamore v. State*, 257 S.C. 413, 186 S.E. 2d 250 (1972). This Court believes that a constitutional issue is raised only if an inmate's work assignment is decided arbitrarily or capriciously. *Beatham v. Manson*, 367 F. Supp. 783 (D. Conn. 1973). Such an allegation is not present in this record.

Plaintiffs claim in their seventh and ninth causes of action that the defendants have failed to provide them with a reasonable opportunity for rehabilitation and that the present conditions at the Southern Ohio Correctional Facility are such as to increase the likelihood that they will not be rehabilitated or successfully integrated into society in violation of the cruel and unusual punishment provision of the eighth amendment and due process provision of the fourteenth amendment. While rehabilitation is certainly an important goal of an institution of confinement, this Court has been unable to find a single case holding that there is a general constitutional right to rehabilitation.

Plaintiffs' tenth cause of action alleges that the conditions at the Southern Ohio Correctional Facility constitute a punishment in addition to that ordered by the trial court responsible for the original incarceration of the plaintiffs and thereby violates the double jeopardy provision of the fifth and fourteenth amendments.

This Court has been unable to locate any authority supporting plaintiffs' legal theory. Furthermore, one of the most recent treatments of the double jeopardy clause by the United States Supreme Court indicates that the purpose of the double jeopardy clause is to prevent a citizen from experiencing the risk of multiple trials and convictions, not punishment. *Breed v. Jones*, 421 U.S. 519 (1975).

Plaintiffs' eleventh cause of action alleges that the defendants have defaulted on their responsibility under Ohio law to maintain the health and welfare of those placed in

their custody. Such a contention is an attempt by the plaintiffs to induce this Court to exercise pendent jurisdiction over what is clearly a state claim. While this Court may have the judicial power under *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), to exercise pendent jurisdiction under this cause, we expressly decline to do so on the ground that the state courts are more properly the institution to consider the plaintiffs' claims.

Plaintiffs' twelfth cause of action is that the conditions of the Southern Ohio Correctional Facility disproportionately affect black inmates and create conditions of involuntary servitude in violation of the thirteenth amendment of the United States Constitution. However, the thirteenth amendment expressly exempts punishment for a crime from its prohibitions:

> Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

See, e.g., Sims v. Parke Davis and Co., 334 F. Supp. 774 (E.D. Mich. 1971).

In summation, plaintiffs' fourth[1] and eighth cause of action are stricken for failure to comply with this Court's Order of July 29. In addition, plaintiffs' second, fifth, sixth, seventh, ninth, tenth and twelfth causes of action are dismissed for failure to state a cause of action under Section

---

[1]Inmate Chapman has previously raised the same issues contained in the plaintiffs' fourth cause of action by way of a civil rights action before this Court. In that action this Court held an extensive evidentiary hearing on the adequacy of the medical and dental care at the Southern Ohio Correctional Facility and denied preliminary relief on May 16, 1973. *Chapman v. Gilligan*, Civil No. 8700 (S.D. Ohio May 16, 1973 (Hogan, J.). Furthermore, inmate Jaworski has also attempted to raise the same issues in another civil rights action filed in this Court. That action was recently dismissed. *Jaworski v. Rhodes*, No. C-1-76-263 (S.D. Ohio August 25, 1976) (Porter, J.).

1983. This Court also refuses to exercise its discretion to consider the state claim raised in plaintiffs' eleventh cause of action.

Plaintiffs are hereby granted leave to file a second amended complaint consistent with this Opinion within ten days. Defendants shall have ten days within which to respond to said second amended complaint.

It has been this Court's desire that a trial on the merits of this action be held at an early date. In that regard, this Court previously set a deadline for the completion of discovery by August, 1976 and reset, at the parties request, that deadline to October, 1976. The confusion resulting from the filing of the amended complaint necessitated the vacating of the October deadline. This Court believes that the confusion is now eliminated. Accordingly, this matter is once again referred to the United States Magistrate for any and all discovery and pretrial purposes.

/s/ Timothy Hogan
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-1-75-251
JUDGE HOGAN

KELLY CHAPMAN, *et al.*,

Plaintiffs,

vs.

JAMES A. RHODES, GOVERNOR, *et al.*,

Defendants.

SECOND AMENDED COMPLAINT
(CLASS ACTION)

Filed Dec. 27, 1976

I. PRELIMINARY STATEMENT

This is a class action filed by inmates at the Southern Ohio Correctional Facility (hereinafter SOCF), located at Lucasville, Ohio, arising out of the severe overcrowding and confinement of inmates under conditions which counter meaningful rehabilitation thereby constituting cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and a denial of due process and equal protection in contravention of the Fourteenth Amendment to the United States Constitution. These conditions stem directly from the decision by defendants to increase the number of inmates confined at SOCF to a figure well above the design capacity of the institution and beyond the staff and institutional resources available to effectively respond to the needs of such a population. A substantial number of prisoners are compelled to live two per cell in cells originally designed for single occupancy.

The oppressiveness of this overcrowding is manifested by the scarcity of vocational, educational, job opportunities which allow inmates an opportunity to escape the idleness and tension of their congested cell and living area. It has produced a situation where a substantial percentage of the inmate population is reduced to a status of chronic idleness, without meaningful and relevant educational and rehabilitative opportunities, living in constant fear of assault and bodily injury. The atmosphere at the SOCF is regressive and counter-productive to commonly accepted standards of rehabilitation and civilized incarceration. To force inmates to endure such overcrowded conditions with the gross absence of opportunities for meaningful growth and rehabilitation is inhumane and dehumanizing; moreover, such conditions actually dehabilitate inmates. These conditions compel judicial intervention.

II. JURISDICTION

1. This cause of action arises under 42 U.S.C. §1983 and lies in this Court by virtue of 28 U.S.C. §1343(3). It is not subject to the requirement of a minimum amount in controversy.

2. Plaintiff's action for declaratory and injunctive relief is authorized by 28 U.S.C. §§2201, 2202 and Rules 57 and 65 of the Federal Rules of Civil Procedure, which relate to the declaratory judgment and injunctions.

3. Jurisdiction is invoked pursuant to 42 U.S.C. §1983 which provides redress for the deprivation under color of law of rights, privileges and immunities secured to all persons within the jurisdiction of the United States by the Constitution and laws of the United States, and the Eighth and Fourteenth Amendments to the United States Constitution.

III. PARTIES

A. PLAINTIFFS

4. Kelly D. Chapman is incarcerated by reason of a conviction of armed robbery upon a judgment from the Court of Common Pleas of Hancock County, Ohio, and is being subjected, due to the overcrowding at SOCF, to conditions of confinement that are unconstitutional.

5. Richard Jaworski is presently incarcerated by reason of multiple drug convictions arising from the Court of Common Pleas, Cuyahoga County, Ohio, and is being subjected, due to the over-crowding at SOCF, to conditions of confinement that are unconstitutional.

B. CLASS ACTION ALLEGATIONS

6. This action is filed on behalf of named plaintiffs and, pursuant fo Rule 23(a), (b) (1) (2) of the Federal Rules of Civil Procedure, on behalf of all others similarly situated as inmates of the Southern Ohio Correctional Facility who are compelled to live in the overcrowded conditions.

The requirements of Rule 23 are met in that: the class is so numerous that a joinder of all members is impractical; there are questions of law common to the class; the representative parties will fairly and adequately protect the interest of the class; and the parties opposing the class have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

C. DEFENDANTS

7. James A. Rhodes is Governor of the State of Ohio. As such, he is charged by Article III, Section 6 of the Constitution of 1851 "[to] see that the laws are faithfully

executed." His office is in the State Capitol, Columbus, Ohio.

8. George F. Denton is the Director of the Ohio Department of Rehabilitation and Correction. As such, he is entrusted by law to provide adequate care, custody and treatment to all prisoners incarcerated under his control. He is sued in his official capacity.

9. A. R. Jago is the Superintendent of the Southern Ohio Correctional Facility. As such, he is in direct control of custody of the plaintiff class, and he is charged with the responsibility for the health and welfare of the plaintiff class. He is sued in his official capacity.

IV. FACTS

10. Approximately fifty percent (50%) of the population at SOCF is compelled by defendants to live on a two-man basis in cells designed and adequate only for single occupancy.

11. A substantial proportion of plaintiff class has been confined to isolation and subjected to loss of privileges in order to protect themselves from the danger of physical and emotional exploitation and serious injury arising from overcrowding.

12. Plaintiffs Chapman and Jaworski were housed, at the time this action was commenced, in Section K-8 of the SOCF in cells which were originally designed for one man, but which presently hold two, and their situations are typical of fifty percent (50%) of the institution. The remaining population faces the imminent prospect of living under similar circumstances.

13. This doubling-up occurs in a cell designed and adequate for single occupancy. The dimensions of each cell are 10′ 6″ by 6′ 6″, with toilet, bunk, sink, bureau, and personal items which leave an area for movement of no more than twenty-five square feet. This overcrowding is so severe

that when one individual chooses to be on the floor of the cell, the other must, of necessity, remain in his bunk.

14. As a result of putting 160 men into an 80-man cellblock, the blocks are humid and stuffy with stale air day and night, and the extra heat deriving from the "body heat" in the overcrowded units makes time spent enclosed in the cell unbearable. Odors of sweaty and unwashed bodies and intolerable noise levels are a constant fact of existence.

15. Those inmates housed in cell block units which have been doubled-up suffer twenty-four hours per day without even one moment of privacy. Dayrooms, which are large rooms attached to each cell block area and which frequently provide the only practical means of recreation, are required to accommodate one hundred-sixty men, rather than the intended eighty. Dayrooms are frequently so overcrowded that the men barely have room to stand, and because the dayroom has no toilet facilities or drinking water, one must wait for an occasional break to urinate or get a drink of water.

16. The adverse consequences of overcrowding extends not only to those doubled celled, but also to the entire prison population.

17. The resources, programs, and services which were barely adequate when the institution housed fourteen hundred inmates have now become grossly inadequate due to the overcrowded conditions. Defendants have not provided a programmatic, vocational, recreational or organizational curriculum or adequate staff or resources necessary to meet the needs of the expanded population, resulting in serious fundamental deficiencies in the rehabilitative opportunities available to the inmates, their health and welfare and psychological well-being.

18. Medical, dental, psychiatric and social work resources have been severely overburdened by the needs of increased population, permitting the treatment of only acute problem disorders and illnesses which have managed to come to the

attention of the institution staff. Problems are permitted to deteriorate further, resulting in unnecessary hardship to the plaintiff class and often reach a point where their consequences are irreversible. No facilities exist to allow the appropriate screening and monitoring of inmates' health and emotional needs.

19. The present resources in the institution are totally unable as a result of the overcrowding to provide assistance to those who have educational, vocational, and counseling needs. Work assignments are extremely limited and, as a consequence, a substantial percentage of the inmate population finds itself living in forced idleness, where they must remain almost exclusively within the confines of their cells and cellblock areas.

20. The extraordinary overcrowding, combined with the lack of meaningful opportunities for work, educational and vocational assistance and the absence of social services, have actually lessened opportunities for successful rehabilitation and re-entry into society and served to dehabilitate inmates.

21. No rational basis exists for the arbitrary and capricious allocation among the prison population of the acutely scarce treatment and rehabilitation programs. Various classes of inmates have been developed and are defined by their access (or lack thereof) to the opportunities and resources offered by the institution.

22. Successful rehabilitation is frequently contingent upon a penal environment which offers opportunities for mature responsibility, educational accomplishment, relevant vocational training and the maintenance of the basic dignity of the individual. Overcrowding at SOCF, as manifest by the enforced idleness, minimal work and rehabilitative opportunities, and dehumanizing conditions, has produced an environment that contributes to, rather than combats, episodes of disruptive and antisocial behavior, and lessens the possibilities for successful release and reintegration into society. The overcrowding thus not only precludes

rehabilitation, but also serves to dehabilitate the prison population, and in fact increases significantly the likelihood that members of plaintiff class will commit criminal acts upon release.

23. The overcrowded conditions create increased hostility, tension, anger and violence within the institution, and the inability or unwillingness of the guard force to effectively provide reasonable protection to the inmate population has produced a situation in which many of the plaintiffs live in constant fear of acts of random violence, physical exploitation, serious injury and/or death. For these inmates, the only solution often is either to secure protection at the hands of stronger inmates or to accept self-imposed isolation. This lawless atmosphere within the institution produces a demoralizing situation, enhancing the suspicion and hostility of the inmates, and contributes to a situation of everincreasing violence and tension.

24. Members of plaintiff class are denied parole opportunities in an unreasonable and arbitrary fashion in that consequences directly arising from overcrowding are attributed to plaintiffs and adversely affect their parole opportunity.

25. Food and other vital resources have decreased proportionately per inmate with the increase of the population. The quantity and quality of food is presently grossly inadequate.

26. The law library facilities have not been expanded to meet the needs of the increased population; instead, the defendants employ procedures and policies that restrict inmate access to legal resources, causing members of plaintiff class to suffer delay in completing and filing papers essential to pending litigation.

27. Visitation facilities at SOCF have been overwhelmed by the increased number of individuals seeking to avail themselves of their use, depriving the plaintiff class of adequate contact with family and friends.

28. Defendants have inadequately trained guards to effectively cope with the increased number of inmates, particularly those inmates of a different race and background. This has led directly to a situation in which guards have used unwarranted force and intimidation against the plaintiff class in general and implemented discriminatory and racist procedures and policies against racial minorities.

V. FIRST CAUSE OF ACTION

29. Compelling members of the plaintiff class to live under the circumstances described in paragraphs 10 through 28, fully incorporated herein, creates a process of dehumanization and illustrates a contempt for their existence, which shocks the decency and conscience of a humane society and violates the prohibitions of cruel and unusual punishment contained in the Eighth and Fourteenth Amendments to the United States Constitution.

VI. SECOND CAUSE OF ACTION

30. The confinement of the members of the plaintiff class, under a regime of enforced overcrowding and idleness, to close quarters with no opportunities for privacy, the denial of reasonable opportunities for relief from conditions of overcrowding in their cellblocks, the provision of substandard and inadequate food, the inability to effectively check and deter the violence and lawlessness by inmates against inmates and the prolonged confinement under the circumstances described in paragraphs 10 through 28, fully incorporated herein, constitutes cruel and unusual punishment, is excessive and disproportionate punishment, and violates the Fourteenth Amendment of the United State Constitution.

VII. THIRD CAUSE OF ACTION

31. The manner in which defendants allocate treatment and rehabilitation opportunities and resources, as described in paragraphs 17-21 and 25-28, fully incorporated herein, violates the Fourteenth Amendment to the United States Constitution in two ways: first, the arbitrary and capricious assignment of inmates to those opportunities and resources denies equal protection to inmates not so assigned; and, second, the discretion used in assigning inmates is impermissibly tainted by consideration of the race of the inmate.

VIII. PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court:

1. Assume jurisdiction of the causes and set this case down promptly without unreasonable delay for hearing;

2. Enter a Final Judgment pursuant to Section 28 U.S.C. §§2202, 2201, and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure, declaring that the overcrowded circumstances present at SOCF that have given rise to denial of necessary staff and resources and consequences as heretofore described violate the plaintiff class' rights under the Eighth and Fourteenth Amendments to the United States Constitution;

3. Order the defendants and their agents to promptly review the status of all those presently confined at the SOCF, with an aim at transferring to other institutions, releasing on work furlough or parole all those individuals presently confined, whose record and prison history prior to the overcrowding at SOCF indicate a successful reintegration into society or whose need for confinement in a maximum security institution is not demonstrable.

4. Further, order that defendants are precluded from considering as determinative in their reclassification or release decisions the fact that inmates have not demonstrated success under the overcrowded conditions with vocational training work assignments, educational advances, or other programs at SOCF or have incurred a disciplinary record as a result of conditions generated by the overcrowding of the institution.

5. Appoint a special master to insure that the State of Ohio and defendants use sufficient programmatic and financial resource and staff to ensure that each member of the plaintiff class is not confined under conditions that produce dehabilitation. The special master shall have the authority to periodically review the situation at SOCF to determine the extent to which the programs being operated by the institution are in conformity with constitutionally prescribed standards;

6. Enjoining defendants, their successors, employees or agents and all other persons from operating SOCF under overcrowded conditions and placing two men in a single cell (unless such confinement is for a short-term period only).

7. Retain jurisdiction over this suit for a period sufficient to gauge compliance with the orders of the Court and guarantee nonrepetition of defendant's conduct.

8. Grant such other and further relief as to this Court deems necessary and just.

Respectfully submitted,,

/s/ R. Raymond Twohig, Jr.
R. RAYMOND TWOHIG, JR.
Trial Attorney for Plaintiff
HANDELMAN & TWOHIG

/s/ Robert K. Handelman
ROBERT K. HANDELMAN
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186 East 11th Avenue
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/s/ Louis A. Jacobs
LOUIS A. JACOBS
Supervising Attorney
Clinical Programs
College of Law
The Ohio State University
1659 North High Street
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(614) 422-6821
All Counsel of Record
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Second Amended Complaint was mailed, first class postage prepaid, to defendants, through their counsel, Allen P. Adler, Assistant Attorney General, Criminal Activities Section, Office of the Attorney General, State Office Tower - 15th Floor, 30 East Broad Street, Columbus, Ohio 43215, this 23rd day of December, 1976.

/s/ Louis A. Jacobs
LOUIS A. JACOBS

J.A. 26

Case No. C-1-75-251

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,
Plaintiffs,

vs.

JAMES A. RHODES, et al.,
Defendants.

ALTERNATIVE PLANS IN COMPLIANCE WITH THIS COURT'S ORDER OF JUNE 29, 1977
Filed Nov. 11, 1977

In compliance with this Court's order of June 29, 1977, defendants submit five alternative plans for ending double celling at the Southern Ohio Correctional Facility.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

/s/ Allen P. Adler
ALLEN P. ADLER
Assistant Attorney General
State Office Tower
Suite 1521
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414

ALTERNATIVE COMPLIANCE PLANS

The following alternative plans are submitted in compliance with the June 29, 1977 order of the United States District Court for the Southern District of Ohio in the case of *Chapman v. Rhodes,* Case No. C-1-75-251, to "...proceed with reasonable dispatch to formulate, propose and carry out some plan which will terminate double celling at SOCF."

The plans are rank ordered from most desirable to least desirable in relation to institution security, institution programming, cost, and feasibility and timing of implementation. Wherever an alternative requires funding approval from persons outside the Department of Rehabilitation and Correction, such is noted.

ALTERNATIVE #1

Examination of the recent trend in reduced rates of prison commitments from the criminal courts, and as has been projected this reduction can be anticipated as remaining stable, together with the fact that many inmates sentenced for first degree felonies will become eligible for parole for the first time, leads to the projection that the population of the Southern Ohio Correctional Facility (hereinafter SOCF) will stabilize and probably decline over the next four years.

In fiscal year 1974 (July 1, 1973 through June 30. 1974) the total number of commitments was 5,126 prisoners. In fiscal year 1975 the number rose to 7,219 and rose again in fiscal year 1976 to 7,352 prisoners. In fiscal year 1977 the number of commitments fell to 6,867 prisoners. Prior to 1974 the commitment rate was consistently under 5,000 prisoners annually. It is opined that the large increases were due to the revision in the entire Ohio criminal code which became effective on January 1, 1974, together with an increasing crime rate. Recently, however, the incremental effects of the code revision have abated and stabilized; and the crime rate

is dropping. Furthermore, prisoners given minimum sentences of five, six, or seven years in 1974 will become eligible for parole consideration in 1977 and 1978. A prisoner given a five-year minimum sentence becomes eligible for parole after serving three years and four months of that sentence. A prisoner given a six-year minimum sentence is eligible for parole in three years, nine months and eighteen days, and a prisoner given a seven-year minimum sentence is eligible after serving four years, five months, and six days. Since the SOCF population contains a high percentage of prisoners with such minimum sentences (approximately 40% of the SOCF population are first degree felons), it is reasonable to believe that parole rates will increase at the SOCF as the size of the eligible pool increases.

From the foregoing, it is the Department of Rehabilitation and Correction's belief that the Court's objectives can be achieved within a reasonable time without resort to radical and potentially hazardous restructuring of its programs. It is recognized, however, that certain classifications of prisoners at the SOCF are best suited for single-celled housing immediately.

With this in mind, the Department of Rehabilitation and Correction proposes as its first alternative that double celling would be authorized only for cell blocks containing prisoners having either a job or school assignment, or both. Cell blocks currently containing such inmates are designated L1 through L8, K6 through K8, and D2. (It is not anticipated that D2 cells would be double bunked, however.) These inmates are and will continue to be permitted to remain outside their cells between the hours of 6:30 a.m. and 9:30 p.m. daily. All other housing areas would be authorized single cells only, unless redesignated to house inmates in the above-described categories.

Barring substantial changes in the criminal law respecting sentencing or a sudden increase in the crime rate, this alternative should prove successful. The Department prefers

this alternative since it allows for optimal deployment of custody personnel and otherwise maximizes security. Additionally, this alternative facilitates rehabilitative programming, and can be implemented at low cost and with presently available funding.

ALTERNATIVE #2

All cells designated for single occupancy. To house the remaining inmates, up to forty beds would be placed, each in front of a ground level cell door, in eleven "outside cell" blocks. Viz., L1 through L8 and K6 through K8. In addition to beds, adequate shower, toilet, and storage facilities will be provided. Each inmate assigned to a bed will have 77 square feet of personal living space at full capacity. There will be four foot aisleways between the beds and the cell doors. The open housing area is approximately 3,080 square feet and 61,000 cubic feet in size. Presently this area is termed an exercise area. It is seldom used for such purpose, however, as ample and more desirable recreation areas are available for prisoners assigned to these cell blocks.

This arrangement will allow for similar deployment of security personnel as Alternative #1, but is thought to be somewhat less secure overall since open living areas would be exposed to a greater number of prisoners than cell areas. Additionally, there is some cost associated with this alternative for the provision of toilet, shower, and storage facilities not incurred under Alternative #1. Rehabilitative programming should remain at the level provided in Alternative #1. This alternative could be implemented within two months, following receipt of required equipment. It should be noted that this alternative fully meets the Court's mandate of fifty square feet of personal living space per prisoner. Further, the maximum population of a cell block would be reduced from 160 to 120 prisoners. This alternative can be accomplished within the existing budget for the Department.

ALTERNATIVE #3

All cells designated for single occupancy. To house the remaining inmates, the M-1 gymnasium (at the end of L Block), an industrial shop, and the print shop would be converted to dormitories. Each dormitory would be further divided into not greater than 50-man living units with appropriate separation maintained. Prisoners would sleep on beds with adequate toilet, shower, and storage facilities provided. Dayroom type facilities would also be established. Each prisoner assigned to such a dormitory would have in excess of 60 square feet of personal living space at full capacity of 600.

The print shop is approximately 10,492 square feet net in area; the M-1 gym is approximately 8,664 square feet net in area; the shoe shop is approximately 12,932 square feet net in area.

This alternative is viewed as less desirable than the previously discussed alternatives since approximately sixty additional security personnel would be required to supervise the dormitories. Additionally, certain structural modifications would be required in order to maintain adequate security in the dormitories. Rehabilitative programming will be reduced because of the shop closings and recreational opportunities will be curtailed because of the gymnasium closing. Adequate recreation, however, can be maintained through greater utilization of the M-2 gymnasium and outside recreation areas. The cost of implementing this alternative is anticipated to be greater than under the previous alternatives. This alternative could be implemented fully within six months following receipt of the necessary equipment and supplies. It should be noted that this alternative fully meets the Court's mandate of fifty square feet of personal living space per prisoner.

The facility modification required by this alternative can be accomplished within the existing budget for the

Department. Additional funding would be required to hire custody personnel.

ALTERNATIVE #4

Construct an additional block containing 640 cells. This alternative would allow each inmate at the Southern Ohio Correctional Facility to have a single cell upon completion of the new housing unit.

While desirable from a security standpoint, this alternative would require the hiring of approximately 100 additional custody personnel. The estimated cost of construction is $15,000,000. Funding could be provided through the passage of House Joint Resolution No. 15 which requires public approval. It is anticipated that were funding approved, the construction could be completed within two years. It is believed that current support facilities (air circulation, water supply, food service, etc.) are of sufficient capacity to maintain an additional cell block.

This alternative, as noted, requires action by persons outside this Department to execute and cannot, therefore, be assured. Security, rehabilitative programming, and essential services would remain adequate under this alternative.

ALTERNATIVE #5

Construction of new prisons with funding provided for in House Joint Resolution No. 15. That bill has been recommended for passage by the House Judiciary Committee but has not yet been voted upon by the full House. This bill provides for a $280,000,000. bond issue to be submitted to the voters. It is anticipated that this matter could not be placed on a State-wide ballot before June, 1978. Construction of the new facilities would require from two to four years. Since this alternative requires both legislative and public approval for funding, implementation cannot be

assured. The measure does, however, have the support of the Department of Rehabilitation and Correction.

All prisoners at the Southern Ohio Correctional Facility would likely be provided with single cells upon completion of the new prisons and transfer of certain prisoners.

J.A. 33

COMPLIANCE PLAN COSTS
CHAPMAN v. RHODES

1. No additional cost.		
2. Commodes: 5 per range -- 11 ranges @$65 ea.	$3,575	
Sinks: 5 per range -- 11 ranges @$45 ea.	2,475	
Plumbing Supplies & Materials -- 55 units @$45 ea.	2,475	
Floor Modifications @ $70 per range	550	
TOTAL MATERIALS		$9,075
2 Plumbers: 176 hrs. ea. @$8.10 + 14.3% fringe	3,259	
2 Maint. Workers: 176 hrs. ea. @$8.20 + 14.3% fringe	3,299	
1 Maint. Supv.: 176 Hrs. @$8.20 + 14.3% fringe	1,650	
TOTAL LABOR (at O.T. rate)		8,208
TOTAL MODIFICATION COST		$17,283
3. This alternative cannot be met due to the requirement of 60 additional security staff; costs as follows:		
50 CO II @$ 8,819 + 20.5% = $10,267	$531,350	
7 CO Supv. I @$ 9,506 + 20.5% = $11,455	80,185	
3 CO Supv. II @$11,544 + 20.5% = $13,911	41,733	
Holiday and other O.T. @ 7%	45,279	
TOTAL CUSTODY LABOR	698,547	
Uniforms and Equipment @ $140 each	8,400	
TOTAL ADDITIONAL STAFF COST		$706,947
Construction Costs, utuilizing the following areas - shoe shop, warehouse, and M-1 gym.		
38 Shower Units @ $100 each	$3,800	
56 Commode Units @ $100 each, complete	5,600	
56 Sinks @ $80	4,200	
Security Screen in Gym	5,000	
Fencing - Roof of OPI Building	6,480	
Exhaust Fans for OPI Building	4,000	
Security Locks and Additional Doors	2,000	
Lighting and Wiring for all areas	9,000	
TOTAL MATERIALS		40,080
Labor = 1848 hours (8 staff) @ $63.26 hr. plus fringes		19,120
Supplies = Lockers @ $40 x 440		17,600
TOTAL CONSTRUCTION COSTS - base		$116,880
TOTAL FIRST YEAR COSTS		$823,827

Loss of Income to OPI
Shoe Shop $198,589 x 110% = $218,447 per year

Note, Alt. No. 3:

M-1 Gym = 110 bed spaces (8,664 sq. ft. net ÷ 110 = 78.8 sq. ft.)	15,730 sq. ft.
Shoe Shop = 215 bed spaces (12,932 sq. ft. net ÷ 215 = 60.0 sq. ft.)	67,006 sq. ft.
Print Shop = 174 bed spaces (10,492 sq. ft. net ÷ 174 = 60.0 sq. ft.)	total OPI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Alternative Plans for Compliance With This Court's Order of June 29, 1977, was served on plaintiffs through their counsel, Robert B. App, American Civil Liberties Union of Ohio Project on the Rights of the Institutionalized, 203 East Broad Street, Columbus, Ohio, 43215, and Christopher D. Stanley, 535 Leader Building, East 6th and Superior, Cleveland, Ohio 44114, by regular U.S. mail this 11th day of November, 1977.

/s/ Allen P. Adler
ALLEN P. ADLER
Assistant Attorney General

NO. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

v.

JAMES A. RHODES, et al.,

Defendants

ORDER

Filed May 8, 1978

—A—

A Judgment was entered in this case on April 7, 1978. Defendants filed a motion to reconsider on April 13, 1978. To the extent, if any, that this Court presently has jurisdiction of that motion (a Notice of Appeal having been filed on May 1, 1978) - the motion to reconsider is denied. The motion is in reality a reassertion of the defendants' Alternate Plan I and the rejection of that Plan (see Memo of March 21, 1978) is repeated.

—B—

On May 1, 1978 defendants moved for a stay of execution pending appeal. The record does not support the claim that a reduction of 25 inmates a month will work a hardship on the State. The Assistant Director of the Department of Corrections testified: "We hope to handle around 40 from Lucasville per month."

In *Adams v. Walker*, 488 F. 2d 1064 (7th Cir. 1973), an "intrusion into the affairs of state government" case, the

Court described a "request for a stay" as a request for an "extraordinary remedy" and set forth the factors for consideration, including:

(a) Has movant shown that unless the stay is granted they will suffer irreparable injury?

(b) Where lies the public interest?

(c) Whether the stay would substantially harm other parties to the litigation.

Compliance with the Judgment is within the reasonable and ordinary capabilities of the defendants and will not substantially injure the State. The continued constitutional deprivation will injure the plaintiff class. Surely the public interest will not be disserved by providing, for 25 human beings a month, a requirement (50 square feet of living space per man) which has been conclusorily described by one United States Court *(Gates v. Collier,* 423 F. Supp. 732 (Miss. 1976)) as -

> "No one takes issue with this basic requirement for human decency and this Court holds a failure to achieve that minimal standard contravenes the Eighth Amendment prohibiting cruel and unusual punishment."

The weight of authority in the United States courts construed the Constitution as requiring 50 to 60 square feet of cell per inmate. (See Findings and Conclusions filed June 29, 1977, pages 38 and 39.) For instance, in *Palmigiano v. Garrahy,* 443 F. Supp. 956 (R.I. 1977), (3/27/78 Advance Sheets), the United States District Court in its order (pg. 987) directed the State of Rhode Island (in its maximum security prison) -

> "7. No more than one prisoner shall be confined in any cell which is less than 60 square feet."

and directed compliance in full within "nine months from the entry of this order."

F.R.C.P. 62(c) authorizes a district court "in its discretion" to "suspend" an injunction pending appeal. As a matter of discretion and for the reasons indicated, the Court concludes that the injunction of April 7, 1978 should not be suspended.

The motion for a stay is therefore denied.

/s/ Timothy Hogan
United States District Judge

Case No. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs,

vs.

JAMES A. RHODES, et al.,

Defendants.

STIPULATION AND ENTRY

Filed August 25, 1978

It is hereby stipulated and agreed between counsel for the parties, based upon the representations made to the Court in the chambers conference on August 22, 1978, that the Court's Judgment entered on April 7, 1978, shall be construed as follows:

1. "Assigned population" as used in Paragraphs 2 and 4 of the Judgment means total population including in-house, absent with leave, and absent without leave.

2. "Thirty days" as used in Paragraphs 2 and 4 of the Judgment means calendar month.

3. On or before August 31, 1978, the defendants shall reduce the assigned population of S.O.C.F. to 1,896 (one thousand eight hundred ninety six), which is twenty-five persons less than the actual assigned population on July 30, 1978, and shall reduce the assigned population by twenty-five persons every calendar month thereafter.

4. "Single cell capacity" as used in Paragraph 2 of the Judgment means 1,645 (one thousand six hundred forty five) which shall be the maximum permissible assigned

population after compliance with Paragraph 2 of the Judgment. This figure of 1,645 (one thousand six hundred forty five) is derived from the 1,620 (one thousand six hundred twenty) single residential cells at S.O.C.F. plus twenty-five, the approximate number of persons absent with leave at any given time.

5. It is further stipulated and agreed between counsel for the parties that Plaintiffs' Motions for a Rule to Show Cause and their requests for discovery are withdrawn; that Defendants' Motion for a Protective Order is withdrawn; and that Defendants shall provide the reports described in Paragraph 4 of the Judgment to counsel for the Plaintiffs on Monday of each of the four weeks following the date of this stipulation, such report to reflect the population at S.O.C.F. for the preceding Friday; at the end of that four week period, reports shall be submitted as provided by Paragraph 4 of the Judgment.

6. Counsel for the Defendants shall provide a copy of this stipulation to each of the defendants in this action.

8/24/78 Date	/s/ Timothy Hogan U.S. District Judge
8-23-78 Date	/s/ Allen P. Adler William J. Brown, Attorney General by Allen P. Adler, Assistant Attorney General Attorney for all Defendants
Aug. 23, 1978 Date	/s/ Robert P. App Robert P. App Attorney for Plaintiffs

NO. C-1-75-251

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

KELLY CHAPMAN, et al.,

Plaintiffs

v.

JAMES A. RHODES, et al.,

Defendants

ORDER DENYING MOTION FOR RELIEF FROM JUDGMENT AND STAY OF EXECUTION

Filed August 14, 1979
John D. Lyter, Clerk

Defendants to this case move for relief from the judgment of this Court, entered April 7, 1978 (doc. 211), and for a stay of the execution of the judgment pending the ultimate disposition of the case (doc., 258). Defendants' motion has been opposed (doc. 259), and is now submitted for the Court's consideration.

Pursuant to Federal Rule of Civil Procedure 60(b)[1] defendants move for relief from judgment on the ground that the judgment of this Court is in conflict with the recent decision of the Supreme Court of the United States in *Bell v. Wolfish*, 47 U.S.L.W. 4507 (U.S. May 14, 1979). We do not agree that the judgment is in conflict with *Wolfish*. The

[1]Defendants do not indicate pursuant to which subsection of Rule 60(b) their motion is made, but we presume that it has een made pursuant to subsection (5) and/or (6). *See generally C. Wright & A. Miller, Federal Practice and Procedure* §§ 2863, 2964 (1973).

Supreme Court in *Wolfish* was not unaware of this Court's decision in this case. In a footnote to the majority opinion, Mr. Justice Rehnquist wrote:

> Respondents' reliance on other lower court decisions concerning minimum space requirements for different institutions and on correctional standards issued by various groups is misplaced. Brief for Respondents 41, and nn. 40 and 41; see, *e.g., Campbell v. Magruder, supra; Battle v. Anderson*, 564 F. 2d 388 (CA 10 1977); *Chapman v. Rhodes*, 434 F. Supp. 1007 (S.D. Ohio 1977); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676 (Mass. 1973).... The cases cited by respondents concerned facilities markedly different from the MCC. They involved traditional jails and cells in which inmates were locked during most of the day. *Given this factual disparity, they have little or no application to the case at hand.* Thus, we need not and do not decide whether we agree with the reasoning and conclusions of these cases.

47 U.S.L.W. at 4513 n. 27 (emphasis added).[2] Given this treatment of our decision by the Court, we think that *Wolfish* provides no basis for granting defendants relief from the judgment of this Court entered on April 7, 1978. Defendants' motion, insofar as it seeks relief from judgment, is denied.

Defendants again seek a stay of the execution of the Court's April 7, 1978 judgment. By an Order dated May 8, 1978 (doc. 220) we denied a similar request by defendants. For substantially the same reasons discussed in that Order, defendants' present request is not well taken, and defendants'

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[2]In his dissenting opinion, Mr. Justice Marshall cites our decision to support the proposition, "Other courts have found that *in the circumstances before them* overcrowding inflicted mental and physical damage on inmates." 47 U.S.L.W. at 4521 n. 11 (emphasis added).

motion, insofar as it seeks a stay of the execution of the judgment of this Court entered on April 7, 1978, is denied.

Finally, there exists some uncertainty in this Court's mind whether it possesses jurisdiction not only to indicate that it is willing to consider defendants' motion, insofar as it is made pursuant to Rule 60(b),[3] but also to dispose of that motion without a remand of the case from the United Staes Court of Appeals for the Sixth Circuit, where it is now pending (No. 78-3365). In *First National Bank v. Hirsch,* 535 F. 2d 343 (6th Cir. 1976), the Sixth Circuit sought to outline the proper procedure which a party should follow when it seeks to make a Rule 60(b) motion after a notice of appeal has been filed. Although the Court noted that the "[f]iling of a notice of appeal operates to transfer jurisdiction of the case to the court of appeals, and the district court is thereafter without jurisdicion except to act in aid of the appeal," 535 F. 2d at 345 n. 1 (citations omitted), the Court set forth the proper procedure as follows:

> [W]e think that the party seeking to file a Rule 60(b) motion...should have filed that motion in the district court. *If the district is disposed to grant the motion,* he may enter an order so indicating and the party may then file a motion to remand in this court.

Id. at 346 (emphasis added); *accord, United States v. Phillips,* 558 F. 2d 363 (6th Cir. 1977). The inference from this language in *First National Bank v. Hirsch* is, we think, that the Court possesses jurisdiction not only to indicate its willingness to consider defendants' motion, insofar as it is made pursuant to Rule 60(b), but also to dispose of that motion, particularly since the Court chooses to deny it. *See*

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[3]We do not think that there is any question that this Court possesses jurisdiction to consider defendants' motion, insofar as it concerns a stay of execution. *See Fed. R. App. P.* 8(a); *Fed. R. Civ. P.* 62(c).

Ferrell v. Trailmobile, Inc., 223 F. 2d 697, 699 (5th Cir. 1955); *Schattman v. Texas Employment Commission*, 350 F. Supp. 328, 330 (W.D. Tex. 1971); *rev'd. on other grounds* 459 F 2d. 32 (5th Cir. 1972); C. Wright & A. Miller, *supra* note 1, § 2873, at 265. If, however, this Court is without jurisdiction to dispose of defendants' motions, this Order serves to indicate, respectfully, to the Court of Appeals this Court's willingness to consider the defendants' motion and the disposition which we would make. *Cf. New Jersey Life Insurance Co. v. Getz*, No. C-1-75-254, slip op. at 3 n. 1 (S.D. Ohio July 3, 1979) (doc. 51) (indicating Court's uncertainty concerning whether it possessed jurisdiction to dispose of Rule 60(b) motion).

SO ORDERED.

/s/ Timothy Hogan
United States District Judge

J.A. 44

No. 78-3365

UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KELLY CHAPMAN, ET AL.,
Plaintiffs-Appellees

v.

JAMES A. RHODES, ET AL.,
Defendants-Appellants

ORDER

Filed November 8, 1979
John P. Hehman, Clerk

Before: WEICK, CELEBREZZE and MERRITT, Circuit Judges.

This matter is before the Court for consideration of the defendants-appellants' Motion to Advance Case on Calendar and Summary Reversal. In this motion, the defendants-appellants also request a stay of execution pending appeal. The plaintiffs-appellees have filed a memorandum in opposition to this motion.

Upon consideration of the defendants-appellants' request for summary reversal and the plaintiffs-appellees' response thereto, the Court concludes that summary disposition of the above appeal is not warranted at this time. The Court further concludes that the defendants-appellants have failed to meet the four criteria which must be met before a stay pending appeal will be granted, see *Reed v. Rhodes,* 549 F. 2d 1049, 1048 (6th Cir. 1976) and that their request to advance the above appeal on the Court's calendar is not well taken.

It is therefore ORDERED that the defendants-appellants'

motion for summary reversal, for an expedited hearing and for a stay are denied. Judge Celebrezze would grant the stay and advance the case for hearing.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk